STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

DONALD OWENS, PJ

LOUIS GHAFFARI,

Plaintiff-Appellant,

vs.

TURNER CONSTRUCTION COMPANY, a Michigan corporation, HOYT, BRUM & LINK, a MI corporation, GUIDELINE MECHANICAL, a Michigan corporation Jointly,

Defendants-Appellees.

Supreme Court Nos. 124786, 124787

BRIEF ON APPEAL - APPELLANT

ORAL ARGUMENT REQUESTED

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STATEMENT OF FACTS

Louis Ghaffari brought suit to recover damages for injuries sustained when he slipped on pipes left on a construction project walkway. The building under construction was an IMAX theater addition to the Henry Ford Museum in Dearborn.

As a result of the fall, plaintiff sustained severe injuries to his dominant right hand and shoulder which have permanently disabled him from his electrician trade. He has had multiple surgeries to the wrist and shoulder.

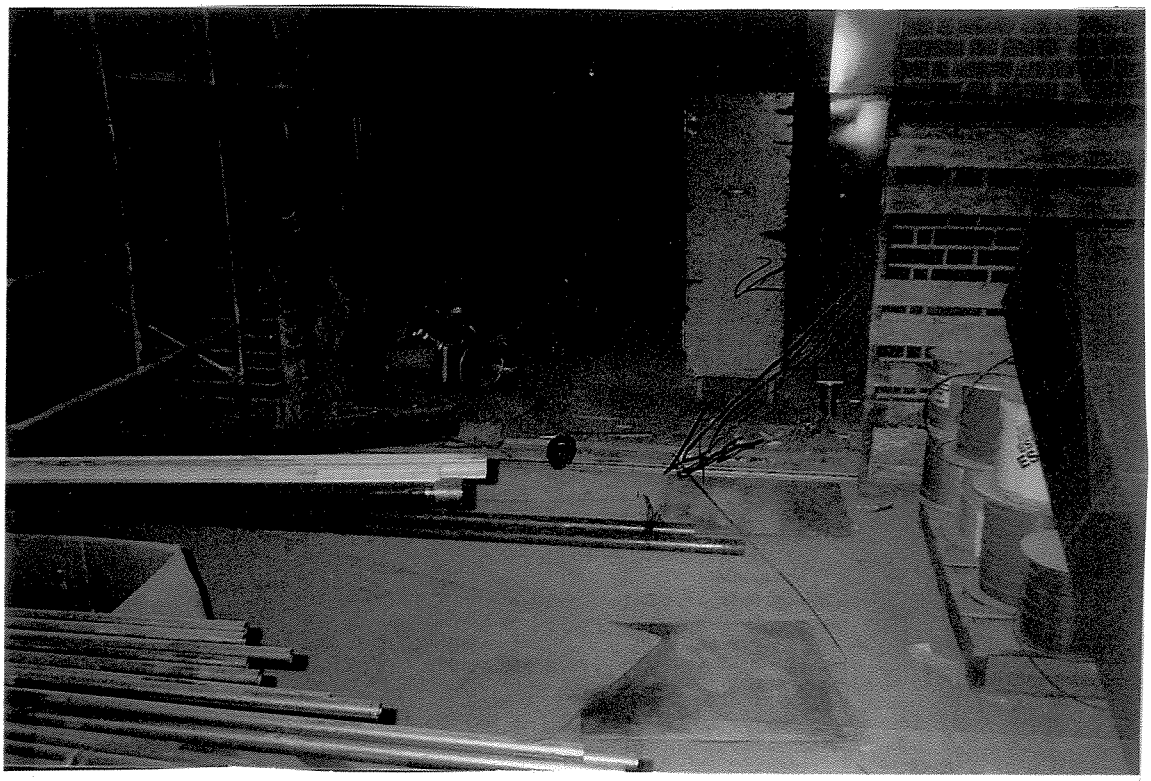
The owner of the IMAX theater was The Edison Institute, dba the Henry Ford Museum. Edison hired Turner Construction as Construction Manager of the project. Turner negotiated contracts with the trades, which Edison then signed. Plaintiff's employer was the electrical contractor, Conti Electric.

The pipes on which plaintiff slipped had been left in the walkway by either Hoyt, Brum & Link or by Guideline Mechanical, two contractors on the IMAX project. Plaintiff's complaint charged both companies with leaving pipes on the floor of an aisle way in violation of Michigan general negligence law, and specific OSHA regulations which require construction project walkways and storage areas to be maintained free of trip and slip hazards.

Plaintiff also sued Turner Construction, construction manager of the project, alleging it violated duties requiring it to clean up walkways and storage areas and remove trip and slip hazards, or direct the other contractors to remove the hazards and clean up. Plaintiff claimed Turner's duties arose from three sources: Turner's contract with the project owner, OSHA regulations pertaining to construction managers, and the common work area doctrine set forth in

Funk v General Motors, 392 Mich 83, 220 NW2d 641 (1974).

The pipes on which plaintiff slipped are shown in this photograph, which was taken minutes after the accident by Chris Mamp, plaintiff's foreman (affidavit, Appendix 3a)



This photo shows *several* sets of pipes in the passageway. Some are on the floor, and others are atop cardboard boxes. They lay very near an archway connecting the existing museum to the new theater.

The two copper pipes on which plaintiff slipped are near the center of the photo and are marked with an X. Behind these pipes is the archway through which plaintiff entered the area of the accident a moment before he fell. His view of the pipes was hidden until he emerged from behind the metal boxes and brick wall, traveling in the direction shown by the arrow.

Duncan Wilson, Turner Construction's job-site superintendent, testified that the walkway had been an informal storage area, used by subcontractors to store their material, but not at his direction. At the time the pipes and other material were stored, the archway shown in the photo was barricaded by plywood. Mr. Wilson ordered the plywood removed two to three weeks before the accident, and immediately the trades began walking through the archway, stepping over and around the pipes and other material. Mr. Wilson did not order the stored material to be moved out of the path of the tradesmen. (Appendix 36a depo 13, 39a depo 26)

Plaintiff testified at deposition that he stepped on the pipes the first time he ever walked through the archway. This happened when he came around the wall, circling from behind the steel gangboxes which stood in the walkway. *The wall and gangboxes obscured his view of the floor as he rounded the corner:*

> A I was walking through a doorway which I had never been through before because it had been barricaded with a plywood wall. I approached the doorway from the side, not straight on. When I passed through, I didn't expect to see pipe laying smack on the other side of the doorway. When they came into view, it was too late to avoid them. I stepped on them and they rolled, causing me to be thrown off my feet and fall on my back with my right hand extended and hitting the floor very hard.
>
> Q What do you mean by "I approached the doorway from the side, not straight on"?
>
> A I didn't exactly come like right through here. [the center of the archway] I came from the side angle.
>
> Q From behind the gang boxes?
>
> A Yes. (Appendix 9a, depo 85, 86)
>
> Q You stated in your answers to interrogatories that when the pipes came into view it was too late to avoid them?
>
> A Yes.

Q What do you mean by that?

A All I can remember, I was fixated on looking up at these *other* pipes.

Q Which you were approaching?

A Yes.

Q Were these pipe closer to eye level?

A A little lower than eye level, probably waist level . (Appendix 15a-16a, depo 140-141)

The foreman, Mr. Mamp, said in his affidavit (Appendix 3a) that *numerous* hazards were in the area plaintiff fell:

> Other pipes were laying on top of cardboard boxes in the middle of the walkway. These other pipes and the boxes were also a hazard to someone coming around the gangboxes. There were other trip hazards in the walkway....

Turner Construction investigated the accident and determined it was not caused by Mr. Ghaffari's negligence but by "housekeeping/cleaning failure" – allowing pipes to be "laying on floor across doorway." (Appendix 103a). Turner Construction took "corrective action:" it "moved hazard and cleaned area of debris."

After the close of discovery, defendants moved for summary disposition under MCR 2.116 (C)(10). All defendants argued they owed no duty to plaintiff to remove the pipes from the walkway, claiming the pipes were "open and obvious," citing *Lugo v Ameritech*, 464 Mich 512, 629 NW2d 384 (2001). Guideline Mechanical also moved for summary disposition on a second ground, claiming there was no evidence it had left the pipes in the walkway.

Plaintiff responded that the pipes were not open and obvious because they were hidden to him until a second after he rounded the corner, and because other material left in the middle of the walkway drew his attention as he rounded the corner.

Plaintiff also argued that *Lugo* did not apply, because defendants did not possess the premises. *Lugo* was a doctrine available only to possessors of premises.

Plaintiff also asserted the open and obvious doctrine did not apply because defendants violated a plethora of duties, established by statute, which required defendants to inspect construction site walkways for slip and trip hazards and to remove them. In support of this argument, he cited the following safety rules, known as MIOSHA rules and promulgated pursuant to MCLA 408.1011, a statute mandated by the federal Occupational Safety and Health Act, 29 USC 651.[1]

Michigan Construction Safety Standards, Part 1, GENERAL RULES (Appendix 17a), provided:

> R 408.40114 Employer responsibilities; accident prevention program
>
> Rule 114. (1) An employer shall develop, maintain and coordinate with employees an accident prevention program...
>
> (2) An accident prevention program shall, at a minimum, provide for all of the following:
>
> (C) *Inspections of the construction site... to assure that unsafe conditions which could create a hazard are eliminated.*
>
> R 408.40119 Housekeeping and disposal of waste materials.
>
> Rule 119.... (3) *The floor of a work area or aisle shall be maintained in a manner that does not create a hazard to an employee*

Another provision of Construction Safety Standards (Appendix 19a) provided:

> PART 8. HANDLING AND STORAGE OF MATERIALS

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[1] The state regulations were issued pursuant to the Michigan Occupational Safety and Health Act, MCL 401.1001 et seq., which was enacted in compliance with the federal Occupational Safety and Health Act of 1970, 29 USC §651.

R 408.40818 General Provisions. Rule 818.

(6) *Storage areas, aisles and passageways shall be kept free of the accumulation of materials that constitute a hazard to the movement of... employees.*

Federal OSHA regulations 29 CFR §1926.20 (Appendix 20a) and 29 CFR §1926.250 (Appendix 21a) placed identical burdens on all contractors. Federal OSHA regulations also put an additional burden on the "prime contractor" (Turner Construction in this case):

29 CFR §1926.16 Rules of construction.

(a) ... In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract.

Plaintiff additionally argued Turner owed him a *contractual* duty to remove the pipes on which plaintiff slipped. He cited Turner's contract with Edison, which required it to "clean up" the project:

2.2.7 GENERAL CONDITION ITEMS. General Condition Items as used herein shall mean the provision of facilities or performance of work by the Construction Manager for items which do not readily lend themselves to inclusion in one of the separate trade contractor agreements... General Condition Items are: .....*clean-up*;.... [Appendix, 24a]

Plaintiff also cited *Funk v General Motors,* supra, arguing Turner as construction manager owed a duty to take reasonable measures to reduce the hazard of injury in common work areas. In support of this argument, plaintiff cited documents produced in discovery plus the deposition testimony of Edison and Turner management, showing that Turner Construction directed the work of all the trades, *including compliance with OSHA safety regulations:*

- Turner inspected for safety violations committed by the trades. It compelled contractors to make corrections, or hired laborers to correct violations and then

back-charged the contractors.

- Turner held weekly safety meetings which the trades were required to attend.
- Turner assigned "lay down" areas, that is, locations for on-site storage of construction material.

In short, Turner did everything a general contractor does.

Both Edison Institute and Turner Construction employees testified that *Turner had overall responsibility for job safety*. Edison's project manager, Joseph Ceccato, testified (Appendix 30a):

> Q With regard to the safety of the workers who were putting up this project, did you have any responsibility of overseeing that?
>
> A No.
>
> Q Who did?
>
> A Turner Construction. (depo 17)
>
> Q And why do you say that?
>
> A They were hired as construction managers (18)
>
> A Duncan Wilson is the superintendent [of Turner]. He would have been in charge of keeping the site safe.
>
> Q Making sure the contractors cleaned up their debris? Stored their material in a safe place?
>
> A Correct. (24, 25)

Turner Construction manager Zoltan Lukacs agreed he had "overall responsibility for the job," including getting the contractors to correct safety hazards. His subordinate, Duncan Wilson, did the actual work of enforcing safety regulations. (Appendix 32a, Depo 6, 18)

Duncan Wilson, Turner's job-site superintendent, admitted he had overall safety control of

the project. "We would identify safety hazards and then we would get the laborers and contractors to fix the area." (Appendix 39a, Depo 28)

Further evidence that Turner Construction was the "prime contractor" as regards safety is Edison's contracts with Hoyt, Brum & Link, Guideline Mechanical, and all the other trades. *This standardized contract placed Turner in charge of enforcing compliance.* For example, the Edison-Guideline contract (Appendix 41a), states:

> Compliance with Law and Permits
>
> Article XIV. The Contractor...shall comply with all federal, state... regulations... including but not limited to those relating to safety.... and whether or not provided for by the plans, specifications, general conditions, or contract documents.. The Contractor shall at any time upon demand furnish such proof as the owner *or Turner* may require showing such compliance and the correction of such violations.

Plaintiff argued that the foregoing documents and regulations established defendants' duties to inspect for trip and slip hazards, and to remove them from construction site walkways.

The Trial Court's Ruling (Appendix 77-86a)

The trial court ruled that the open and obvious doctrine applied even though defendants did not possess the premises, and that the doctrine overrode any duties established by safety regulations. The trial judge held the pipes were open and obvious as a matter of law, even though she conceded "there was not enough foreview for Mr. Ghaffari to have seen the pipes." (Appendix 85a).

The trial court also accepted Guideline Mechanical's argument that plaintiff had not produced evidence that the pipe on which he slipped belonged to Guideline, and granted summary disposition to Guideline on that additional ground.

Plaintiff filed a motion for rehearing. The trial court denied the motion (Appendix 87a).

Turner and Hoyt moved for case evaluation sanctions. The trial court rejected plaintiff's argument that sanctions should not be awarded under MCR 2.403(O)(11), awarded Turner $16,648 in attorney fees and costs, and awarded Hoyt $10,721.76. (Appendix 90a, 93a)

The Court of Appeals affirmed all rulings of the trial court, 259 Mich App 608, 676 NW2d 259 (2003). (Appendix 95a) The Court held:

(1) the open and obvious doctrine could be invoked by the general contractor and subcontractors as a complete defense to a suit brought by a worker injured in a construction accident;

(2) the pipes on which plaintiff slipped were open and obvious as a matter of law;

(3) the open and obvious defense could be invoked by the general contractor despite the duty imposed on it by the common work area doctrine;

(4) plaintiff could not invoke the common work area doctrine set forth in *Funk, supra*;

(5) federal and Michigan OSHA laws did not impose upon defendants any duty owed to plaintiff to comply with OSHA regulations; and

(6) the attorney fee awards to defendants under MCR 2.403 were proper.

ARGUMENT

I.

THE OPEN AND OBVIOUS DOCTRINE SHOULD NOT APPLY TO A CLAIM UNDER THE COMMON WORK AREA DOCTRINE DESCRIBED IN *ORMSBY v CAPITAL WELDING,* 471 MICH 45, 684 NW2d 320 (2004)

The common work area doctrine holds that it is

> part of the business of a general contractor to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against *readily observable,* avoidable dangers in common work areas which create a high degree of risk to a significant number of workmen. *Ormsby*, supra, 471 Mich at 54, quoting *Funk v General Motors,* 392 Mich 91, 104, 222 NW2d 641 (173). (Emphasis supplied)

The open and obvious doctrine holds that the possessor of a premises owes no duty to an invitee to remedy *readily observable* hazards, absent "special aspects." *Lugo v Ameritech*, 464 Mich 512, 629 NW2d 384 (2001).

These doctrines are incompatible. One imposes a duty to protect against hazards which are open and obvious, while the other says no duty exists if the hazards are open and obvious, absent special aspects. Application of the open and obvious doctrine to the common work area doctrine would nullify the latter, except where a special aspect exists.

The open and obvious doctrine is inconsistent with federal and state OSHA regulations. These require construction contractors to reduce the risk of injury from job-site hazards *even though they are open and obvious.*

The open and obvious doctrine would cause some general contractors to ignore open and obvious hazards, killing and crippling workers. The contractors will succumb to the sharply

reduced incentive they will have to heed safety regulations and the common work area doctrine, knowing they can defeat tort claims where the hazards causing the injuries were open and obvious. Two great protections for workmen on construction sites – MIOSHA regulations and the common work area doctrine – would lose a great deal of their effectiveness.

Here is a partial list of the many construction site hazards which are open and obvious yet expose tradesmen to danger. For each there is a MIOSHA rule requiring the hazards to be ameliorated *even though they are open and obvious*[2]:

- Work surfaces more than 6 feet above ground without rails or barricades (such as the open-sided floors of a building under construction)
- Dangerous machinery
- Floor holes (holes cut in floors for later placement of pipes, machines, skylights, etc) more than 6 feet above the floor below
- Scaffolds without rails, barricades or personal fall arrest systems
- Scaffolds not secured to buildings or other structures
- Pits or excavations lacking barricades to prevent falls
- Excavations whose sides are not shored against collapse
- Ladders without safety feet
- Unsecured ladders placed on unstable bases
- Storage areas and passageways with slip or trip hazards on the floors, such as pipes, oil,

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[2] See, for example, the following Michigan Construction Safety Standards: Part 1, General Rules, R 408.40101 et seq; Part 11, Fixed and Portable Ladders, R 408.41101 et seq; Part 12, Scaffolds and Scaffold Platforms, R 408.41201 et seq; Part 21, Guarding of Walking and Working Areas, R 408.42101 et seq; Part 26, Steel Erection, R 408..42601 et seq; Part 45, Fall Protection, R 408.44501 et seq.

debris, hydraulic fluid, gravel, etc

- Hoists without rails
- Stairways without rails
- Framing steel without flooring or a net underneath
- Decking bundles placed on steel joists which have not been completely bridged, anchored and secured.

Hundreds more hazards could be added to this list, each of which are addressed by federal and MIOSHA regulations requiring contractors to reduce the risk of injury despite the open and obviousness of the hazards.

It might be argued that if the open and obvious doctrine were grafted onto the common work area doctrine, the result would not pose a great risk to building tradesmen because the general contractor would still owe a duty under *Lugo* to protect tradesmen if the hazard presented a "special aspect" which posed "an unreasonably high risk of severe harm." *Lugo*, 464 Mich 512, 518. A job-site superintendent walking a project, it might be argued, will be able to easily determine which hazards impose such risk, and which do not. Since the general contractor remains obligated to correct hazards posing an unreasonably high risk of death or severe injury, the argument goes, little harm would be caused by abolishing tort liability for failure to fix violations which are likely to cause only broken legs or arms.

This approach should be rejected. First, it gives general contractors carte blanche (as far as tort law is concerned) to permit MIOSHA violations to continue, so long as they do not pose "an unreasonably high risk of severe harm." This policy encourages violation of a subset of federal and state safety regulations - those which do not involve "an unreasonably high risk of severe harm."

It is unseemly for Michigan's highest court to encourage violation of *any* safety regulation, even ones which do not involve an "unreasonably" high risk of "severe" harm.[3]

Allowing general contractors to avoid tort liability for failing to enforce some safety rules but not others would clash with the spirit and the letter of federal OSHA law, which places on the general contractor responsibility for compliance with *all* safety regulations for *all* work performed under the contract.[4]

A rule which permits a general contractor to escape liability for failing to correct hazards which violate MIOSHA but which do not involve "an unreasonably high risk of severe harm" is an unworkable rule. It does not provide a clear bright line for a general contractor to follow in the field. *The general contractor often will be unable to determine whether a hazard imposes a risk of "severe" harm which is "unreasonably" high.* Does an floor hole with a drop of five feet pose such a risk? A drop of seven feet? Does an eight foot ladder without safety feet pose such a risk? A ten foot ladder? A general contractor need not puzzle over whether a hazard creates a risk of "severe" harm and whether the risk of that harm occurring is "unreasonably" high if he must at all

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[3] The common work area doctrine imposes a duty to correct hazards even if they do not pose a risk of "severe" harm. The doctrine applies as long as the hazard involves a "high degree of risk," regardless of the severity of the harm. The open and obvious doctrine, on the other hand, holds that an open and obvious hazard must be ameliorated only if it poses a risk of "severe" harm and if the risk of such harm is "unreasonably" high. The open and obvious doctrine dilutes the protection given workers by the common work area doctrine in that it (1) requires proof of risk of "severe" harm, and (2) proof that the risk of occurrence was not merely "high" but "unreasonably" high.

[4] 29 CFR §1926.16, Rules of Construction, provides, "(a) ... In no case shall the prime contractor be relieved of overall responsibility for compliance with the requirements of this part for all work to be performed under the contract."

times enforce compliance with MIOSHA regulations in common work areas under *Ormbsy*.

Must a safety superintendent mull over the formula "unreasonably" high risk of "severe" harm before deciding whether to correct hazards he knows violate MIOSHA regulations and create high risk in a common work area? Safety and ease of application dictate he should not. This Court should not make it tricky and difficult for the superintendent to do his job. He should not have to ponder whether a hazard presents a "special aspect," when MIOSHA and the common work area doctrine require correction of the hazard.

If the superintendent must do what MIOSHA and *Ormsby* tells him he must do – if he must order the subcontractors to fix a violation as soon as he spots a violation creating a high risk in a common work area -- he will have a clearer and brighter line to follow.

Other reasons point to the unwisdom of extending the open and obvious doctrine to construction cases. *Lugo, supra,* and its progeny involved ordinary slip and fall hazards facing individuals in parking lots and buildings. Construction sites present *more hazards* than parking lots and buildings, *more dangerous* hazards (more likely to kill or maim), and hazards which can kill or maim *not just individuals but several people at once*. Extension of the open and obvious doctrine to construction cases will kill and cripple many building tradesmen.

Construction sites hazards are more likely to maim or kill than slips and falls in parking lots or shopping malls. The typical slip and fall causes broken bones, but construction site hazards often crush workers, bury them alive, burn them, lop off their limbs, or drop them fifty feet to death or paralysis.

Here are just a few of the construction site hazards which typically cause more severe injuries than those caused by slips and falls in parking lots and buildings: excavation walls not

shored up, which collapse and bury men alive; floor holes through which a worker falls twenty feet to death, brain injury or quadriplegic; open sides of a building under construction unprotected by guard rails, from which a worker may fall to death or paralysis; scaffolds not tied off, which shift when workers are climbing and throw men off, to death or multiple fractures and herniated discs; hilos cris-crossing construction sites trundling large loads which obscure the vision of the drivers and cause them to run over people and crush them; steel joists not secured against collapse, which drop workers to the ground thirty feet below; rebar sticking up from an unguarded foundation hole disembowels a worker who trips and fall into the hole.

All of Michigan's published construction cases involved death or permanently disabling injuries. This severity of injury contrasts sharply with the "little risk of severe harm" which *Lugo* held was "typical" of open and obvious dangers in parking lots and malls.[5] *Lugo*, 464 Mich 512,

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[5] Funk fell thirty feet through a hole and was "seriously injured," *Funk*, supra; Hardy fell and died, *Hardy*, supra; 516 NW2d 502 (1994); Louis Ghaffari was permanently disabled; Nicholas Bosak lost four fingers of his left hand, *Bosak v Hutchinson,* 422 Mich 712, 375 NW2d 333 (1985); Thomas Plummer fell from an unguarded work platform and suffered multiple skull fractures blinding him in one eye; *Plummer v Bechtel Construction Company,* 449 Mich 646, 489 NW2d 66 (1992); Wendell Bohnert was killed, *Groncki v Detroit Edison,* 453 Mich 644, 556 NW2d 289 (Mich); David Burger fell and suffered "permanent injuries," *Burger v Midland Cogeneration Venture,* 202 Mich App 310, 507 NW2d 827 (1993); Thomas Candelaria was killed, *Candelaria v B.C. General Contractors, Inc*, 236 Mich App 67 600 NW2d 348 (1999), Jonathan Hughes fell twenty feet and "suffered severe and permanent injuries," *Hughes v PMG Building, Inc*, 227 Mich Ap 1, 574 NW2d 691 (1997); William Phillips died when a falling beam "almost cut decedent in half," *Phillips v Mazda Motor Mfg*, 204 Mich App 401. Ralph Erickson slipped and fell twenty feet, and "his injuries required several months of hospitalization, numerous operations and intensive therapy," *Erickson v Pure Oil,* 72 Mich App 330, 249 NW2d 411 (1972); Kenneth Signs died, *Signs v Detroit Edison,* 93 Mich App 626, 287 NW2d 292 (1986); John Kubisz suffered "severe burns," *Kubisz v Cadillac Gage,* 236 Mich App 629, 601 NW2d 160; (1999). Roy Redfern was seriously injured and later died from wounds inflicted by a dangerous machine, *Redfern v R.E. Dailey & Co,* 146 Mich App 8, 379

520, 629 NW2d 384, 388.

Not only is the risk of death, paralysis or maiming higher for construction site hazards than for slip and trip hazards in parking lots or malls, lot and mall hazards typically expose one person at a time to an injury, while construction sites hazards often kill or maim two or ten people at a stroke: a scaffold with a crew of bricklayers atop it tips over; an unsecured steel joist shifts and pitch five men – or five tons of supplies – fifty feet below; an unshored excavation buries an entire work party.

Open and obvious hazards in malls and parking lots are predictably found on the pavement or near floor level. In construction sites, open and obvious hazards may be found in *any* direction – even above. Some of these hazards are in motion. Hilos, booms, cranes, come-alongs, and chain falls may be moving toward the worker. Because hazards may be found in all directions and may be coming towards the tradesman from all directions, *he cannot give as much attention to his path as a pedestrian walking across a parking lot or a building floor*

More yet: loud and sudden noises surround and distract the walking tradesman – the whine of power tools, the pounding of jack hammers, the thud of dropped material, the whirring of a crane, all at the same time. Which sound foretells danger? Which machine may kill him? Which wrench may fall on him? Because danger may come from any direction and from an amazing variety of sources, a walker on a construction site must look up and around and to the side, and do it constantly. At the same time, he must move at a businesslike pace, because he must do his job

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NW2d 451 (1985) David Robinson suffered fatal injuries, *Robinson v A.Z. Shina and Sons Co,* 96 Mich App 44, 293 NW2d 661 (1980) *Ormsby*, supra, does not describe the severity of the injury. Not cited here are cases which did not describe the plaintiff's injuries.

within the time required by his foreman. He has less opportunity to scan his path for slip or trip hazards. The construction worker encounters more dangers and more distractions coming from more directions than pedestrians in malls and parking lots, and therefore he is less able to spot a hazard on the ground which may hurt him, even if it is open and obvious.[6]

Further differentiating construction workers from the pedestrians in *Lugo* is the fact the

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[6] Mr. Ghaffari testified at deposition to this multiplicity of dangers coming from all directions, which made him less able to watch for slip and trip hazards on the floor.:

"There was a lot of work going on, a lot of noise being made, you know. I not only had to watch for obstruction of, you know, floors, but I had to watch for how – construction site's a very dangerous thing, you know, things, you know, could be falling, pipes moving, you know, all that stuff is in my mind." (Depo 47, Appendix 8a)

He also testified:

Q In a construction project, on this day, is there work going on all around you?
A Yes, there is.
Q Are there noises all around?
A Yes, there is.
Q Is there machinery all around?
A. Yes.
Q Are there people walking every which way?
A Yes, they are.
Q Are people walking around carrying materials?
A At times, yes. (Depo 86, 87, Appendix 9a)

Turner Construction superintendent Duncan Wilson agreed that a tradesman rounding a corner on a construction site has to look for dangers coming from all directions, not just from objects laying on the ground:

Q However, in a construction site isn't it fair to say there is a lot of distraction, both visual and auditory, so that you're not always looking at what is at your feet but looking around you to see which other things might be coming at you?
A Yes, you should be watching for total environment.
Q When you're walking you're looking out for material that can be – people can be walking around with material, carrying material, is that correct?
A Correct. (Depo 33)

workers *must* encounter open and obvious hazards or lose their jobs, even when an employer or general contractor has failed to comply with a MIOSHA safety regulation. Tradesmen have little choice: work or go home. This dilemma was specifically acknowledged by this Court in *Hardy v Monsanto Environ-Chem Systems, Inc,* 414 Mich 29, 323 NW2d 270 (1982), and in *Funk,* supra. Such a fundamental choice – between a job and no job – involves stakes much higher than those typically faced by pedestrians shopping for gifts in malls or groceries in supermarkets.

In sum, the risks faced by construction workers greatly exceed those facing pedestrians in typical slip and fall cases. The protection given building tradesmen by the common work area doctrine should not be destroyed.

Nothing in *Lugo v Ameritech,* 464 Mich 512, 528 NW2d 384 (2001), authorized the trial court or the Court of Appeals to expand the open and obvious doctrine to general contractors. Not one word in *Lugo* envisioned open and obvious being used as a shield by general contractors to avoid liability. *Lugo* applied to premises possessors, not general contractors.[7]

This Court should hold that the open and obvious doctrine does not apply in cases brought under the common work area doctrine against a general contractor, and that Turner Construction was not entitled to judgment as a matter of law under MCR 2.116(C)(10) and *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363, 547 NW2d 314 (1996). The decisions of the lower courts against Mr Ghaffari and in favor of Turner Construction should be reversed.

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[7] Throughout this discussion, the term general contractor includes a construction manager whom the owner puts in charge of job-site safety, such as Turner Construction in this case.

II.

THE OPEN AND OBVIOUS DOCTRINE WOULD CONFLICT WITH THIS COURT'S HOLDING IN *HARDY V MONSANTO ENVIRON-CHEM SYSTEMS, INC,* 414 MICH 29, 323 NW2d 270 (1982)

Application of the open and obvious doctrine as a complete defense to a personal injury suit would negate this court's holding in *Hardy,* supra. In *Hardy,* this Court had to "decide whether the *Funk* policy of promoting safety in the workplace would be undermined or enhanced by the application of the principles of comparative negligence." This Court held that comparative negligence enhances workplace safety. The open and obvious doctrine would undermine workplace safety because it would eliminate comparative negligence.

Hardy said that "the comparative negligence rule... enhances safety in the workplace by rewarding safety-conscious contractors." By contrast, the open and obvious doctrine does not reward safety-conscious contractors. Just the opposite. Open and obvious encourages general contractors to be unsafe – they need do nothing to ameliorate open and obvious hazards in order to avoid tort liability. The conscientious contractor who spends money obeying MIOSHA rules addressing open and obvious hazards is worse off financially than the contractor who scoffs at the rules and keeps his checkbook closed.

Hardy approved the application of comparative negligence because it would not allow a contractor who was partly responsible for an injury to totally escape liability for that injury. "...[T]he defense of comparative negligence never allows a contractor to entirely "avoid" liability and thus "escape" the duty of due care.... The comparative negligence defense does not provide a strong financial incentive for contractors to breach the duty to undertake reasonable safety

precautions." *Hardy,* supra. By contrast, the open and obvious doctrine would allow a contractor to escape liability *entirely*, thus giving the contractor a "strong financial incentive" to ignore safety rules which protect against open and obvious hazards..

The decision of the Court of Appeals in this case flatly conflicts with *Hardy,* which said that common law defenses may not be used in construction site cases to completely avoid tort liability and thus undermine compliance with safety regulations. *Hardy* said:

> In *Funk*, this Court found the total bar of contributory negligence to be inconsistent with the public policy of promoting safety in the workplace. The Court refused to allow a general contractor and a landowner to "avoid" liability "by pointing to the concurrent negligence of the injured worker in using the [unsafe] equipment." [citation] Before *Funk*, the contractor could *entirely* avoid liability by convincing the finder of fact that the plaintiff was even 1% negligent. Apparently it was feared that some contractors might succumb to the temptation of employing skilled defense counsel instead of adequate safety devices. As the Court noted in *Tulkku [v Mackworth Rees Division of Avis Industries]*, 406 Mich 622, 281 NW2d 291:
>
> > "To allow defendants in this case to invoke the protection of the contributory negligence doctrine would be tantamount to subverting the very safety concerns that the *Koenig [v Patrick Construction Corp,* 298 NW313, 83 NE2d 133 (1948)] and *Funk* courts extolled as of paramount importance. Such a position might allow a manufacturer to escape its duty of due care ***:
> >
> > "'It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in *no liability* for the very injury the duty was meant to protect against.'" [emphasis added by the Supreme Court]

The complete bar of open and obvious resuscitates the complete bar of contributory negligence. *Hardy* rejected this total elimination of liability for construction site cases because a complete bar would provide "a strong financial incentive for contractors to breach the duty to undertake reasonable safety precautions." *Hardy,* supra, 323 NW2d at 274. "It would be anomalous to hold that defendant has a duty to install safety devices but a breach of that duty results in *no liability* for the very injury the duty was meant to protect against." The words "no

liability" were emphasized by this Court (in *Tulkku*, supra, 406 Mich at 622).

Replacing comparative fault with the complete defense of open and obvious would also clash with the "legislatively imposed duty" of contractors to "to take reasonable precautions for the safety of others" under the MIOSHA laws. This court in *Hardy*, fn 3, stressed that comparative fault promotes compliance with MIOSHA.

Under *Hardy* and *Tulkku*, neither general contractors nor trade contractors should be permitted to raise the open and obvious doctrine defense as a complete bar to liability. The decisions of the court of appeals and trial court in favor of defendants should be reversed.

III.

PLAINTIFF'S CLAIMS AGAINST HOYT, BRUM & LINK AND GUIDELINE MECHANICAL WERE NOT BARRED BY THE OPEN AND OBVIOUS DOCTRINE

Nothing in *Lugo* permitted the application of the open and obvious doctrine to claims against trade contractors such as Hoyt, Brum & Link or Guideline Mechanical. The reasons stated in argument I as to why the open and obvious doctrine should not be invoked by a general contractor are equally applicable to trade contractors. The holdings of the lower courts, that plaintiff's claims against Hoyt, Brum & Link and Guideline Mechanical were barred by the open and obvious doctrine, should be reversed.

IV.

UNDER *JONES V ENERTEL, INC,* 467 MICH 256, 650 NW2d 334 (2002), THE OPEN AND OBVIOUS DOCTRINE SHOULD NOT APPLY WHERE FEDERAL AND STATE OSHA STATUTES AND REGULATIONS REQUIRE CONTRACTORS TO REMOVE HAZARDS

The decision of the Court of Appeals conflicts with this court's decision in *Jones v Enertel, Inc,* 467 Mich 256, 650 NW2d 334 (2002), where this Court held the "open and obvious" doctrine does not bar a claim where the duty to correct the hazard was created by statute. Because defendants in this case violated duties placed on them by Michigan and federal OSHA statutes, the trial court erred in granting summary disposition under MCR 2.116(c)(10), and the Court of Appeals erred in affirming that decision. *Quinto,* supra.

The Court of Appeals agreed that OSHA duties are imposed by statute. "We note that the MIOSHA regulations do impose statutory duties in a punitive context.... See MCL 408.1035. And, in certain circumstances, violating a MIOSHA regulation may lead to criminal penalties. See MCL 408.1035(5) and (7). Similar OSHA provisions are found in 29 USC 666." *Ghaffari v Turner Const. Co*, 259 Mich App 608, 676 NW2d 259 (2003) Nevertheless, the Court rejected plaintiff's argument that defendants' statutory duty to obey OSHA barred the open and obvious defense.

Defendants not only violated the statutes cited by the Court of Appeals, they also violated 29 USC 654(a)(2), which obligates compliance with federal OSHA regulations, and MCL 408.1011, which obligates compliance with Michigan Construction Safety Standards (MIOSHA rules in the construction setting).

These statutory duties are owed by an employer not just to its own employees, *but to all workers on the job site.* OSHA "was enacted... for the special benefit of *all* employees, including the employees of an independent contractor, who perform work at another employer's workplace," *Teal v E. I. DuPont De Nemours and Company*, 728 F2d 799 (Sixth Cir. 1984). The court emphasized *all*.

The Sixth Circuit in *Teal* stressed that the OSHA statute and regulations were intended to benefit every employee on the jobsite, not just an employer's own workers:

> We believe that Congress enacted section 654(a)(2) for the special benefit of *all* employees, including the employees of an independent contractor, who perform work at another employer's workplace. [Emphasis by the Court] Consistent with the broad remedial nature of the Act, we interpret the scope of intended beneficiaries of the special duty provision in a broad fashion. In our view, once an employer is deemed responsible for compiling with OSHA regulations, it is obligated to protect every employee who works at its workplace. Thus, Richard Teal, employee of an independent contractor, must be considered a member of the class of persons that the special duty provision was intended to protect.
>
> 728 F2d at 804 [emphasis by the court]

Plaintiff respectfully submits that Michigan courts must defer to *Teal's* interpretation, because Michigan's OSHA rules and statutes are subject to the federal OSHA scheme, by operation of federal law, 29 USC 651 et seq. 29 USC §667 requires that *state "standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under... this title which relate to the same issues."* Because federal OSHA imposes a duty on a contractor to comply with safety regulations for the protection of all employees on the job site, not just his own employees, Michigan's OSHA must impose the same duty.[8]

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[8] This court held that a predecessor of the OSHA statute imposed a duty on employers to protect employees of independent contractors, *Hardaway v*

The Court of Appeals held that the Michigan Occupational Safety and Health Act does not create a statutory duty owed by a contractor to construction workers tradesman:

> MCL 408.1002(2) expressly provides that MIOSHA does not "enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, disease, or death of employees arising out of, or in the course of, employment." In 29 USC 653(b)(4), OSHA contains an identical provision, thereby preventing OSHA from enlarging an employer's statutory duties.

The Court of Appeals erred because §1001(2) and its federal counterpart apply to the rights and duties of employers *vis a vis their employees.* The language which the Court quoted applies to claims *brought by an employer's own employees,* such as workers compensation; which are not affected by the OSHA scheme. Plaintiff was not defendants' employee, and defendants did not employ plaintiff, and therefore §1001(2) does not apply to this case.

The Court of Appeals also erred because its ruling conflicts with *Teal,* supra, which held that federal OSHA law requires a contractor to obey OSHA for the benefit of *all* employees on a job site, not just its own employees. Because state OSHA laws and regulations must give workers the same or greater protection as federal OSHA laws and regulations, under 29 USC §667, *Teal's* interpretation must be followed.[9]

The Court of Appeals also erred because its ruling conflicts with *Hardy*, supra, which held that a "legislatively imposed duty" requires employers to "to take reasonable precautions for the

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Consolidated Paper Co, 366 Mich 190, 114 NW2d 236 (1962).

[9] *Barker Bros. v Safety & Reg. Bureau,* 212 Mich App 132, 536 NW2d 845 (1997), held "....the federal act provides that a state plan's provisions must be "at least as effective" as those of the federal act, otherwise the federal provision will preempt the state provision. 29 USC §667(c)(2)."

safety of others," fn 3. This Court should affirm its holding in *Hardy* and reverse the Court of Appeals.

For the foregoing reasons, this Court should hold that the open and obvious doctrine may not be used in a case involving safety duties created by state and federal OSHA statutes. On this basis, also, the decisions of the Court of Appeals and trial court should be vacated.

V.

TURNER CONSTRUCTION OWED PLAINTIFF A DUTY TO CORRECT SAFETY HAZARDS UNDER THE COMMON WORK AREA DOCTRINE

In *Ormsby*, supra, this Court affirmed that a general contractor had a duty "to assure that reasonable steps within its supervisory and coordinating authority are taken to guard against readily observable, avoidable dangers in common work areas which create a high risk to a significant number of workmen," citing *Funk,* supra.

Mr. Ghaffari claimed Turner Construction owed him this *Ormbsy/Funk* duty. The Court of Appeals disagreed:

> Here, we are not persuaded that the pipes on the floor posed a "high risk to a significant number of workers." The evidence suggested that the pipes were on the floor in a *storage area*, in contrast to a high traffic path where a significant number of workers would be passing though on a daily basis. Therefore, we conclude that this exception does not apply to the facts of the instant matter. [Emphasis by the court on page 6]

The Court's emphasized statement, that plaintiff fell in a storage area and not a high traffic path, is simply wrong. The site *had been* a storage area next to a blockaded archway, but *it became a much-used passageway weeks before the accident.*

It became a passageway when Duncan Wilson, Turner Construction's superintendent, took down the plywood blocking the archway. Mr. Wilson admitted:

> Q After the plywood was removed in the archway, that became used by the contractors as a walkway, correct?
>
> A It was used as means of egress, yes.
>
> Q Getting to and from the old building to the new building? [From the existing museum to the new IMAX theater]
>
> A Yes.

Q But you knew for two to three weeks before Mr. Ghaffari's accident that contractors were taking shortcuts through the archway?

A Correct (Appendix 39a, Depo 25)

Q So you knew for a couple of weeks before Mr. Ghaffari's accident that various tradesmen were walking to and from their gang boxes going to and from this archway?

A Correct (Appendix 39a, depo 26)

There is other evidence the pipes on the floor created a "high risk to a significant number of workmen." Plaintiff's foreman, electrician Chris Mamp, stated in an affidavit submitted to the trial court that the area where plaintiff fell was used by many trades as a walkway:

> The pipes... were blocking a walkway under an arch... The walkway was used by various trades. (Appendix 3a)

Michael Wanserski, carpenter foreman for another contractor, Acoustical Ceiling and Partition, testified that after the plywood blocking the archway was removed, all the trades then passed through it and into the area where plaintiff fell:

Q The area that you see here, once the plywood was moved, people moved walked back and forth through this opening, is that correct?

A Correct.

Q All the various trades?

A Correct. (Appendix 45a, Depo 16)

Brian Muir, employee of Guideline Mechanical, testified that "various trades" walked through the passageway. People "would be stepping over it and walking from the old building to the new and back and forth," at least for "several days" before plaintiff's accident. (Depo 15, 17, 18, Appendix 47a)

This evidence proves the Court of Appeals erred when it said and *emphasized* the site was merely a storage area. This testimony shows the area where plaintiff fell had become, to use the court's own words, a "high traffic path where a significant number of workers would be passing though on a daily basis." At the very least, plaintiff presented a question of fact which should have prevented summary disposition under MCR 2.116(C)(10). *Quinto,* supra.

There is further evidence the pipes presented a high risk of injury. When a tradesman walked from the museum into the new IMAX theater, *the pipes were not visible until he had passed through the archway and was almost on top of the pipes*. Mr. Mamp, the electrician foreman, said in his affidavit:

> Within minutes after the accident ... I came to the scene.... I inspected the accident scene at that time.
>
> The pipes on which Louis feel were not visible to him when he walked from the museum side of the archway around the gangboxes. The gangboxes blocked his view of the floor on the other side. He simply couldn't see pipes on the floor on the far side of the gangboxes until he was right on top of them, a couple of steps away, when it was too late to avoid them. (Appendix 3a)

Mr. Ghaffari echoed this testimony about the unavailability of the pipes for a worker traversing from the museum to the new building:

> I approached the doorway from the side, not straight on. When I passed through, I didn't expect to see pipe laying smack on the other side of the doorway. When they came into view, it was too late to avoid them. (Depo 85, Appendix 9a)

Mr. Mamp also said that *other material left in the walkway would distract a person from seeing the copper pipes,* adding to the hazard facing a tradesman approaching the pipes from the museum side:

> Also, as the photograph shows, other pipes were laying on top of cardboard boxes in the middle of the walkway. These other pipes and the boxes were also a hazard to

someone coming around the gangboxes, because they were in the middle of the walkway just a few feet from the pipes on the ground, and most importantly, they were at waist level or higher. They would have distracted Lou's attention because they were closer to eye level. A person rounding the gangboxes would see the pipes sitting on the boxes before seeing the pipes laying on the floor.

There were *other trip hazards* in the walkway besides the two sets of copper pipes, as the photo shows. There was black pipe, a white strip of something and pieces of plywood on the floor. All of these objects would distract the attention of someone rounding the gangboxes and entering the walkway. Appendix 3a

Plaintiff's expert Dr. Robert Pachella, a University of Michigan professor specializing in human factors psychology, opined the lack of foreview and the presence of other distractions rendered the pipes *not* open and obvious to someone walking through the archway from the existing building. (Appendix 42a)

The invisibility of the pipes to a workman coming from the museum side of the archway, until he was almost upon the pipes, heightened the risk of injury. The presence of other hazards closer to eye level, distracting a person walking through the arch, also heightened the risk of injury. This increased risk of injury is further evidence the Court of Appeals erred when it held as a matter of law that the pipes were not a hazard subject to the common work area doctrine.

The Court of Appeals stated *emphatically* that the pipes were laying in a storage area. Although that statement was untrue, it was also beside the point. Whether the area was a storage area or walkway was irrelevant to the issue raised by the common work area doctrine – did the pipes create a high degree of risk to a significant number of workmen?

Both OSHA and MIOSHA regulations required pipes to be removed if they constitute a slip or trip hazard *whether they are in a storage area or passageway.*[10] These safety rules are

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[10] See Appendix 19a,20a, federal OSHA §1926.250 General Requirements for Storage, part (c): "*Storage areas* shall be kept free from accumulations of materials that constitute hazards from tripping...." See MIOSHA **R 408.40119**

evidence pipes on the floor constitute a serious slip and trip hazard whether they are in a passageway or storage area.

Significantly, Turner Construction determined the accident was not caused by Mr. Ghaffari's negligence but by "housekeeping/cleaning failure" – allowing pipes to be "laying on floor across doorway." (Appendix 103a) Turner Construction took "corrective action:" it "moved hazard and cleaned area of debris."

Plaintiff presented evidence to the trial court that the pipes created a high risk of accident to a significant number of workmen in a common work area. He demonstrated that workers from at least three trades regularly passed through the area – Conti Electric, Hoyt, Brum & Link, and Guideline Mechanical. He presented evidence the pipes on the floor were not easily visible to a tradesman coming from the museum and through the archway because the tradesman would come upon them abruptly – at which time his sight would be distracted by other pipes and other hazards closer to eye level. He presented evidence the pipes could and did cause serious injury.[11] Plaintiff created an issue of fact as to whether Turner Construction as construction manager owed him a

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Housekeeping and disposal of waste materials., Rule 119: (3) The floor of a work area or aisle shall be maintained in a manner that does not create a hazard to an employee. See also **R 408.40818 General Provisions,** Rule 818: (6) *Storage areas, aisles and passageways* shall be kept free of the accumulation of materials that constitute a hazard to the movement of... employees.

[11] Turner was not a general contractor but a construction manager. This is a distinction without a difference, because it contractually retained and in practice exercised all the supervisory and coordinating authority of a general contractor, as shown in the preceding argument. See, also, *Berry v Barton Malow Enterprises,* COA 235475 (2003), Appendix 49a.

duty under *Ormsby/Funk* to remove the pipes, and the decision of the Court of Appeals affirming summary disposition to Turner Construction should be reversed. Defendants were not entitled to judgment as a matter of law under MCR 2.116(C)(10) and *Quinto,* supra.

VI.

UNDER *FULTZ V UNION-COMMERCE ASSOCIATES,* 470 MICH 460, 683 NW2d 587 (2004), SUMMARY DISPOSITION SHOULD NOT HAVE BEEN GRANTED BECAUSE PLAINTIFF CREATED A QUESTION OF FACT AS TO WHETHER DEFENDANTS NEGLIGENTLY PERFORMED THEIR CONTRACTUAL OBLIGATIONS TO CLEAN UP AND REMOVE SAFETY HAZARDS

In *Fultz v Union-Commerce Associates,* 470 Mich 460, 683 NW2d 587 (2004), this Court affirmed long-standing precedents holding that a contractor may be liable in tort to a person who is injured by the contractor's negligent performance of its contract. Liability arises under a common-law duty "to perform the act in a nonnegligent manner." *Fultz*, supra, at 465

> We described this common-law duty in *Clark v Dalman,* 379 Mich 251, 150 NW 2d 755 (1967):
>
> ******
>
> ....Morever, while this duty of care, as an essential element of actionable negligence, arises by operation of law, it may and frequently does arise out of a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performances constitutes a tort as well as a breach of contract. [Id, at 260-261, 150 NW2d 755] *Fultz,* supra, at 465

In this case (and probably all construction cases), the contractors promised in their contracts with the owner to enforce MIOSHA safety rules. The promise was express - set forth in the contract - and in the case of the general contractor, Turner Construction, it was also mandated by federal OSHA (CFR §1926.16).[12]

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[12] Turner Construction was obligated by its contract with Edison Institute to enforce safety regulations. With regard to slip and fall hazards, it was specifically required to "clean up" the project (para 2.2.7, Appendix 24a). Turner manager Zoltan Lukacs admitted he had "overall responsibility for the job," including getting the contractors to correct safety hazards. His subordinate, Duncan Wilson, said, "We would identify safety hazards and then we would get the laborers and contractors to fix the area." (Depo 9,28, Appendix 35a, 39a)

When Guideline and Hoyt stored pipes, from that point on they owed plaintiff a common-law duty under *Fultz* to continue to store them non-negligently.[13] When the informal storage area became a much-used passageway, Guideline and Hoyt should have moved their pipes out of the walkway. When Turner began managing the construction, from that point on it owed plaintiff a duty to 'clean up" the project and to manage Guideline's and Hoyt's work non-negligently (which in this case meant Turner should have ordered the pipes moved once they became a slip or trip hazard, and they became a hazard when Turner removed the plywood blocking the archway and the informal storage area became a passageway).[14]

Turner Construction negotiated the terms of Edison's contracts with Hoyt, Brum & Link and Guideline Mechanical, which Edison then signed. These standardized contracts *placed Turner in charge of enforcing MIOSHA compliance.* These contracts obligated the trade contractors to obey MIOSHA regulations. For example, the Edison-Guideline Mechanical contract (Appendix 41a), stated:

> Compliance with Law and Permits
>
> Article XIV. The Contractor...shall comply with all federal, state... regulations... including but not limited to those relating to safety.... and whether or not provided for by the plans, specifications, general conditions, or contract documents.. The Contractor shall at any time upon demand furnish such proof as the owner *or Turner* may require showing such compliance and the correction of such violations.

[13] In this regard, note that federal and state OSHA regulations require pipes to be stored in such a manner that they do not create a slip or trip hazard, *whether in a storage area or a passageway.* CFR §1926.250 General Requirements for Storage, and MIOSHA regulations at R 408.40119 Housekeeping and disposal of waste materials, paragraph (3), and R 408.40818 General Provisions, paragraph (6). (Appendix 18a,19a,20a).

[14] Even if the federal and state OSHAregulations did not impose a duty upon defendants to keep slip and trip hazards off the floor, those regulations will be admissible on the issue of whether defendants breached the common-law duty

The Court of Appeals did not address plaintiff's claim that defendants owed him a duty to perform their contracts non-negligently. Without discussing *Clark*, supra, the Court merely stated, "defendants did not owe plaintiff a duty to store the pipes that caused plaintiff's fall in a different manner." The Court erred, because under *Fultz* and *Clark* defendants owed plaintiff a common-law duty to perform their contracts in a non-negligent manner, once they began performing.

When defendants commenced work they owed plaintiff a duty under *Fultz* and *Clark* to work non-negligently, and plaintiff presented a question of fact as to whether they breached their duties by failing to remove, as required by MIOSHA rules, the pipes on which he slipped. Defendants were not entitled to judgment as a matter of law under MCR 2.116(C)(10). *Quinto Cross & Peters Co*, 451 Mich 358, 362-363, 547 NW2d 314 (1996).

Fultz is compatible with *Lugo*. *Lugo* applies to the possessor of a premises. *Fultz* applies to a person performing a contract. The cases have different applications.

Fultz should also prevail here, despite the open and obvious doctrine, because it promotes the goals of federal and state OSHA laws, which require amelioration of construction-site hazards even if they are open and obvious. In the same vein, the open and obvious doctrine as a complete bar to liability would conflict with *Hardy* and *Tulkku*, supra, which held that comparative negligence promotes safety in the workplace.

Under *Fultz, Quinto,* supra, and MCR 2.116(C)(10), the summary disposition granted defendants should be reversed and plaintiff should be allowed to prove defendants violated their common law duty to perform their contracts in a non-negligent manner.

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described in *Fultz* and *Clark,* supra. Once it is determined that a duty exists, safety regulations are relevant evidence. *Zalut v Anderson &Assoc, Inc,* 186 Mich App 229, 235-37, 463 NW2d 236 (1996).

VII.

PLAINTIFF CREATED A QUESTION OF FACT AS TO WHETHER THE PIPES ON WHICH HE SLIPPED WERE OPEN AND OBVIOUS.

Note: This issue need not be addressed if this Court holds that a construction contractor may not invoke the open and obvious doctrine as a complete bar to liability, and on that ground reverses the Court of Appeals and the trial court.

The Court of Appeals held the pipes on which plaintiff slipped were open and obvious as a matter of law, completely barring plaintiff's claim under *Lugo*, supra:

> Moreover, we agree with the trial court's finding that, at least on these facts, the pipes on the floor presented an open and obvious condition. In fact, given that plaintiff was walking in a storage area for a construction site, it was perhaps even more reasonable for workers to expect other workers to watch their steps carefully when walking. Indeed, it would be unreasonable to expect every piece of construction material and equipment to be stored neatly on shelves during a construction project involving multiple subcontractors.
>
> This is not to say, however, that a subcontractor would never be liable for the maintenance of its materials and equipment. But where, as there, the purported danger is caused by a few pipes lying stationary on the floor in a storage area, we do not believe that reasonable minds could differ in finding the danger to be open and obvious.

The Court of Appeals erred. First, the storage area was converted into a walkway by Mr. Wilson's unboarding of the archway two to three weeks before plaintiff's fall. Many workers then walked through the archway and through the storage area.

Second, federal and state OSHA regulations require trip hazards to be removed even though they are open and obvious, and even when the hazards are in a storage area. (Appendix 18a,19a,20a)

Third, plaintiff did not have enough "foreview" to avoid the pipes.[15] The lack of foreview

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[15] Plaintiff testified:

was established by plaintiff's testimony (Appendix 9a, dep 85,86) and the affidavit of his foreman, Christopher Mamp (Appendix 3a).

Fourth, other pipes and boxes closer to eye level distracted plaintiff's vision as he rounded the corner. Plaintiff said in his deposition and foreman Chris Mamp in his affidavit that these other hazards would catch the eye before the pipes on the floor, because they were closer to the eye level of a person coming from the museum side of the archway. (Appendix 8a, 15a, dep 47, 140, and Appendix 3a)

Fifth, plaintiff's expert – a professor at the University of Michigan specializing in human

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A I was walking through a doorway which I had never been through before because it had been barricaded with a plywood wall. I approached the doorway from the side, not straight on. When I passed through, I didn't expect to see pipe laying smack on the other side of the doorway. *When they came into view, it was too late to avoid them.*

Q What do you mean by "I approached the doorway from the side, not straight on"?

A I didn't exactly come like right through here. [the center of the archway] I came from the side angle.

Q From behind the gang boxes?

A Yes. (Depo 85, 86, Appendix 9a)

Mr. Mamp said in his affidavit:

The pipes on which Louis feel were not visible to him when he walked from the museum side of the archway around the gangboxes. The gangboxes blocked his view of the floor on the other side. He simply couldn't see pipes on the floor on the far side of the gangboxes until he was right on top of them, a couple of steps away, when it was too late to avoid them. (Appendix 4a)

Even the trial court agreed plaintiff lacked foreview to see the pipes – and then she held the pipes were open and obvious and granted defendant's motion! (Appendix 85a, line 21-25)

factors psychology – opined the lack of foreview and the presence of other distractions rendered the pipes *not* open and obvious.[16]

Sixth, Turner Construction investigated the accident and determined *it was not caused by Mr. Ghaffari's negligence*. Turner's Accident/Investigation Report found "no unsafe action" by plaintiff and instead attributed the accident to a "housekeeping/cleaning failure" – allowing pipes to be "laying on floor across doorway." (Appendix 103a). Turner Construction took "corrective action;" it "moved hazard and cleaned area of debris."

These six factors require the reversal of the holding that the pipes were open and obvious as a matter of law. Plaintiff presented a question of fact as to whether the pipes were open and obvious. Defendants were not entitled to summary disposition on this issue under MCR 2.116(C)(10) and *Quinto,* supra.

The ruling of the Court of Appeals in this case conflicts with its decision in *Wolfrom v Hillcrest Memorial Gardens Association,* COA 204746 (2002), from which this court denied leave to appeal, ___ Mich ___ (SC 121099 3/11/03), 659 NW2d 229 (Appendix 55a). In *Wolfram,*

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[6] Dr. Robert Pachella, professor of human factors psychology at the University of Michigan, submitted an affidavit in opposition to defendants' motion for summary disposition which pointed out the special difficulty plaintiff had in perceiving and avoiding the copper pipes on the floor. He concluded the pipes were not open and obvious. See Appendix 42a

George Bowden, professional engineer and construction expert, submitted an affidavit to the trial court echoing the statements of Dr. Pachella:

> On construction sites, it is foreseeable that slip and fall accidents will occur because workmen sometimes will fail to notice even life-threatening hazards, but OSHA regulations will prevent or ameliorate those hazards, if the rules are enforced. Appendix 102a

plaintiff presented lay and expert testimony which the Court of Appeals held created a question of fact as to whether the cause of his fall was open and obvious upon "casual inspection." The Court of Appeals' rejection in this case of plaintiff's and the expert's testimony is inconsistent with its holding in *Wolfram.*[17]

The decision of the Court of Appeals in this case also conflicts with its decision in *Dunkle v Kmart Corporation,* COA 218789 (2l001) (Appendix 59a), where the court affirmed a denial of summary disposition. There the court held that the pallet on which plaintiff tripped was not open and obvious as a matter of law, in part because he encountered the hazard just after turning a corner (just like Mr. Ghaffari tripped just after turning a corner). It was irrelevant that plaintiff could have

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[17] The Court of Appeal's decision in this case is especially perplexing because Mr. Ghaffari presented a *stronger* case than the plaintiff in *Wolfram.* Mr. Ghaffari presented proof that *other* pipes and boxes in the walkway, closer to eye level, prevented him from seeing on casual inspection the small pipes on which he fell, until it was too late. Unlike *Wolfram,* a *multiplicity* of hazards and distractions confronted the plaintiff when he rounded the corner – not just the other pipes and boxes lying on the floor of the walkway, but the omnipresence of possible hazards in a busy construction site. Second, Mr. Ghaffari came upon the pipes *suddenly,* when he turned a corner and passed through an archway. Mr. Ghaffari did not have foreview of the hazard. As we have seen, the trial court conceded Mr. Ghaffari did not have foreview. Third, this case involves violations of federal and state OSHA, another fact which distinguishes it from *Wolfram* Fourth, Turner Construction *admitted* plaintiff was not at fault. Turner's Accident/Incident Investigation Report stated no "unsafe act" by Mr. Ghaffari caused the accident, and the accident was caused solely by an "unsafe condition" – pipes which were a hazard and which should have been removed. Fifth, plaintiff's expert, Professor Robert Pachella, a cognitive psychologist at the University of Michigan whose work has twice been cited with approval by the Court of Appeals, opined that the pipes were not open and obvious for a variety of reasons.

Twice the Court of Appeals reversed judgments for defendants based in part on affidavits from Dr. Pachella, in *Pippin v Atallah,* 245 Mich App 136, 636 NW2d 911 (2001), and *Berryman v K Mart,* 193 Mich App 88 (1992). However, in this case the Court's opinion *did not even mention* Dr. Pachella's affidavit.

seen the hazard had he looked down a moment before he tripped. "The fact that Dunkle stated in his deposition that he would have noticed the 'protrusion to the east' if he had 'stopped and looked down,' did not, as a matter of law, make the hazard created by the opening in the pallet an open and obvious one." There was a question of fact as to whether the trip hazard "would be apparent to an ordinary person upon casual inspection." Had the Court of Appeals in this case applied the same standard, it should have determined there was a question of fact as to whether the pipes on which Mr. Ghaffari slipped were "apparent to an ordinary person upon casual inspection," in light of the facts that plaintiff encountered the pipes just after turning a corner, that other pipes in the walkway and closer to his eye level distracted plaintiff before he spotted the copper pipes on which he slipped, that other items on the floor in the walkway were eye-catching hazards, and that Dr. Pachella opined there was insufficient forview for plaintiff to have seen the copper pipes on which he slipped.

Because plaintiff presented a question of fact whether the pipes on which he slipped were open and obvious, summary disposition was inappropriate. The decisions of the trial court and the Court of Appeals, holding that the pipes were open and obvious as a matter of law, should be reversed.

VIII.

SUMMARY DISPOSITION SHOULD NOT HAVE BEEN GRANTED TO GUIDELINE MECHANICAL BECAUSE PLAINTIFF PRESENTED A GENUINE ISSUE OF MATERIAL FACT WITH REGARD TO WHETHER GUIDELINE OWNED THE PIPES THAT CAUSED PLAINTIFF'S FALL

The trial court granted summary disposition in favor of Guideline Mechanical under MCR 2.116(C)(10), determining there was no genuine issue of material fact with regard to whether Guideline owned the pipes which caused plaintiff's fall. (Appendix 64-69a) This was error. Plaintiff presented sufficient evidence to create a question of fact whether the pipes belonged to Guideline.

Michael Wanserski, a carpenter who worked on the project, testified the pipes belonged to Guideline Mechanical. "It looks like plumbers' material. And the plumbing contractor was Guideline Mechanical, so I believe it to be theirs." (Appendix 45a, depo 14)

Richard Wanserski (Michael's father, and also a carpenter on the project) said the pipes were "definitely either plumber or fitter," that is, belonging to either Hoyt, Brum & Link (the fitter contractor) or Guideline Mechanical (the plumber contractor). (Appendix 72a, depo 18)

David Kunath, an employee of Hoyt, Brum & Link, admitted that it could have been his company's pipe but said "it's unlikely that it's Hoyt's, because we were set up right here between the two archways... and then we had out pipe on the scaffold... so it was off the floor." If the pipe wasn't Hoyt's, he said, *then it was Guideline's, because both companies used the same size and type of pipe in the one and two inch range.* (Appendix 73a, Depo 24, 27)

Duncan Wilson agreed the pipes belonged either to Hoyt, Brum & Link or to Guideline Mechanical. (Appendix 34a, 12).

From this evidence, a jury could conclude that the pipes belonged to Guideline Mechanical. Because plaintiff presented sufficient evidence to make a prima facie case against Guideline, summary disposition under MCR 2.116(C)(10) was inappropriate. *Quinto*, supra. The trial court erred in concluding plaintiff failed to created a question of fact whether the pipes belonged to Guideline Mechanical.

IX

IN THE INTERESTS OF JUSTICE, NO ATTORNEY FEE SHOULD HAVE BEEN AWARDED TO DEFENDANTS, AND TURNER SHOULD NOT HAVE RECEIVED AN AWARD GREATER THAN THE FEE IT PAID ITS COUNSEL.

The case was evaluated by the Wayne County Mediation Tribunal on June 25, 2001. On July 3, 2001, this court issued its decision in *Lugo v Ameritech,* 464 Mich 512, 629 NW2d 384 (2001).

Plaintiff's counsel was on vacation on July 3, and did not return until July 18, twenty three days after case evaluation. He mailed his client's rejection of the evaluation to the mediation tribunal either before he left for vacation or within a day or two after returning - unaware of the decision in *Lugo.*

Defendants filed motions for summary dispositions which were heard November 27, 2001, and granted by order of December 19, 2001. (Appendix 75a) Plaintiff's motion for rehearing was denied. (Appendix 87a)

After they were granted summary disposition, defendants filed motions for case evaluation sanctions, relying on MCR 2.403(O)(2)(c). Plaintiff argued that the trial court should in the interest of justice refuse to award costs, citing MCR 2.403(O)(11). The court awarded costs in substantially the amounts requested by defendants. The court of appeals upheld the award. (Appendix 95a)

A.

THE TRIAL COURT SHOULD NOT HAVE AWARDED COSTS BECAUSE *LUGO* WAS DECIDED AFTER THIS CASE WAS EVALUATED.

MCR 2.403(O)(11) rule gives the court discretion to refuse to award costs for rejection of

a case evaluation. It provides:

> (11) If the "verdict" is the result of a motion as provided by subrule (O)(2)(c), the court may, in the interest of justice, refuse to award actual costs.

Cases give no guidance on what is meant by "the interest of justice," but *The Courtroom Handbook on Michigan Civil Procedure*, by Longhofer and Dean, West Publishing Co (2000), indicates sanctions *should not be awarded when evaluation takes place before dispositive motions*:

> The Report of the Mediation Rules Committee indicates that MCR 2.403(O)(11) was adopted due to the fact that, in some courts, cases are submitted to case evaluation "too soon," ie, *before... preliminary dispositive motions resolved.*

Here, case evaluation took place before dispositive motions were resolved. Under this guidance, sanctions should be denied. Had the motion for summary disposition been heard before case evaluation, no sanctions would have been awarded. Defendants simply chose to make their motion after case evaluation, and should not be rewarded for their timing.

This case involves even stronger reasons to deny sanctions. The case was evaluated June 25, 2001, before the decision in *Lugo v Ameritech*, released July 3, 2001.[18] The fortuitous timing of *Lugo* gave the trial court its reason for granting the motions; defendants should not benefit when chance timing provided the trial court with the grounds for dismissing plaintiff's case, and when they, too, rejected the evaluation.

Furthermore, "the purpose of mediation sanctions is to impose the burden of litigation costs upon the party who insists upon trial by rejected a proposed mediation award," *Taylor v Anesthesia Associates,* 179 Mich App 384, 445 NW2d 525 (1989). Since all parties rejected the award, this purpose is not furthered by imposing sanctions on plaintiff, especially where plaintiff rejected

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[18] Plaintiff's counsel was in Europe on vacation until July 18 and was unaware of that decision when he rejected the evaluation. (Defendants also rejected.)

without knowledge of the just-issued decision in *Lugo*.

B.

THE TRIAL COURT SHOULD NOT HAVE AWARDED ATTORNEY FEES BECAUSE *LUGO* APPLIED TO PREMISES LIABILITY CASES AND THIS IS A CONSTRUCTION CASE.

The trial court should have refused to award sanctions in the interest of justice, under MCR 2.403(O)(11), because *Lugo* invoked the open and obvious doctrine in a premises liability case, and this case is a construction case. *Lugo* involved a premises possessor; here, the defendants were a general contractor and subcontractors.

Plaintiff should not be sanctioned for failing to anticipate that a trial court, following no precedent, would expand the open and obvious doctrine to construction accident cases and to general contractors and subcontractors. A party, when deciding whether to accept or reject an evaluation award, should not required to foresee that a circuit court may change the law.

C.

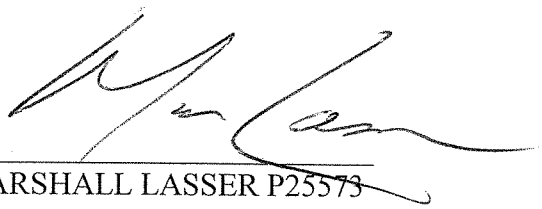
THE COURT SHOULD NOT HAVE GIVEN TURNER CONSTRUCTION $150 PER HOUR FOR ITS ATTORNEY FEES WHEN ITS ATTORNEYS CHARGED ONLY $100 PER HOUR

Turner's counsel admitted in the trial court that he received $100 per hour from the insurer which retained him (Appendix 92a, hearing of April 26, 2002, page 14). The trial court should not have awarded $150 per hour, because the mediation rule awards the prevailing party its "actual costs," MCR 2.403(O).

Turner's counsel cited, and the trial court apparently relied upon, *Wood v DAIIE*, 413 Mich 573, 321 NW2d 653 (1982), as the basis for awarding "reasonable" costs rather than "actual" costs. Because that case awarded costs under the no fault statute, not under MCR 2.403, it was irrelevant.

RELIEF REQUESTED

Plaintiff requests this court to vacate the decisions of the Court of Appeals and the trial court, and to remand this case for trial.



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December 21, 2004